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MICHAEL RODAK, JR., CLERK

NO. 72-299

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

PILGRIM EQUIPMENT COMPANY OF HOUSTON,
Petitioner

v.

THE STATE OF TEXAS, ET AL,
Respondents

PETITION FOR REHEARING ON ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, HOUSTON, 1st SUPREME JUDICIAL DISTRICT OF TEXAS

LEWIS W. CUTRER
JAMES E. HAYS
Counsel for Petitioner
3901 Westheimer, Suite 301
Houston, Texas 77027

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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To The Honorable Supreme Court Of The United States:

Petitioner now presents this timely Petition for Rehearing on this Court's order denying a Writ of Certiorari to the Court of Civil Appeals, Houston, 1st Supreme Judicial District of Texas. We would urge to this Court that our cause be reconsidered. We would show that our cause is not plagued with procedural infirmities, and further, that under the decision in *United States v. General Motors Corp.*, 65 S.Ct. 357, 323 U.S. 373, it appears that Peti-

tioner's offer of evidence relative to moving costs and costs of readapting the remainder should have at least been allowed to be introduced before the jury for their use in determining "market value" of the remainder immediately after the taking. The Court in the above case has stated that the condemnation of a short-term leasehold estate, which is actually carved out of a long-term leasehold estate, is special. We would urge that this is no more a hardship than that which is occasioned by the condemnation of the fee simple interest. This risk should not be placed on the shoulders of one landowner, but, rather, should be carried by the general public.

Petitioner is not asking this Honorable Court to substitute its opinion of the value of our property for that of the jury. On the contrary, we are before you now to urge that the scope of "just compensation for private lands taken for public use" be defined so as to encompass all damages sustained by the landowner as a result of such condemnation. In *United States v. General Motors Corp.*, 65 S.Ct. 357, 323 U.S. 373, the Court has expanded the meaning of the term "property" as contained in the Federal Constitution to encompass the group of rights inhering in a citizen's relation to the physical thing, as the right to possess, use and dispose of it. Why shouldn't this "meaning" be applied in the area of condemnation by a partial taking of the "fee simple" interest? We would urge that this is the proper standard dictated by the Constitution of the United States for all condemnation cases.

Further, at the outset let us answer Respondents' charge that our statement about Federal financing was incorrect. We feel as though Respondents have, through carefully

chosen words, left the Court with the impression that there was an absence of Federal financing with respect to this highway project. At the time of trial, there was not any offer of evidence tending to show actual Federal expenditures on this highway project; however, the Condemnor's Petition for Condemnation stated that such right-of-way was being acquired as a link in U. S. Highway 59. Furthermore, signs appeared on the Condemnee's property which stated that such project was backed by Federal Highway Trust Funds in the amount of $4,700,000.00.

QUESTIONS PRESENTED FOR REVIEW

QUESTION 1 STATED:

Did the Court of Civil Appeals err in holding that the question of adequate compensation was submitted to the jury as required by 28 USCA Constitutional Amendment V, and 28 USCA Const. Amend. XIV, Section 1?

With respect to this question, the Respondents have charged that such a position is plagued with procedural infirmities. We would urge to this Honorable Court that our basis for appeal is procedurally strong. Respondents have quoted the Court of Civil Appeals in pointing out that we have failed to show how the judgment was inadequate. Your Petitioner has perfected this Appeal on the general ground that it has been denied "just compensation" for a partial taking of its land through condemnation; and, further, that this denial was effected through the trial court's refusing to admit evidence as to moving costs, costs of readapting the remainder, and its qualifying of our introduction of evidence concerning loss of profits.

We fail to see how it can be said that these errors were not brought to the attention of the trial court through our Amended Motion for New Trial, Assignments of Error 2, 3, 5 and 13, as set out verbatim in footnote 1, page 12, of our Petition for Writ of Certiorari. With respect to moving costs and costs of readapting the remainder, a Bill of Exception was made at the time of trial (S.F. 122-153). When the Court sustained the objection to this offer, we promptly excepted to the Court's ruling (S.F. 122). With respect to our offer of evidence on loss of profits, this evidence was not offered for any limited purpose and such limitation was only placed on it by the Court in response to an objection raised by the attorney for Respondents.

QUESTIONS 2 AND 3 GROUPED AND STATED:

QUESTION 2:

Did the Court of Civil Appeals err by not reversing and remanding the judgment of the trial court on account of the error committed by said court in refusing to allow the introduction of evidence by the Defendant (Petitioner) as to moving costs, such costs being a necessary item of damage in a judgment rendering "just" or "adequate" compensation to a landowner as a result of a partial taking for public use through eminent domain, as required by 28 USCA Const. Amend. V?

QUESTION 3:

Did the Court of Civil Appeals err by not reversing and remanding the judgment of the trial court on account of the error committed by said court in re-

fusing to allow the introduction of evidence by the Defendant (Petitioner) as to the costs of readapting the remainder after the taking, such costs being a necessary item of damage in a judgment rendering "just" or "adequate" compensation to a landowner as a result of a partial taking for public use through eminent domain, as required by 28 USCA Const. Amend. V?

With respect to Respondents' charge that Petitioner's questions 2 and 3 were not presented to the Court of Civil Appeals for consideration, we believe that this is only a resort to semantics. Petitioner contends that Points of Error I, IV and VI, as presented to the Court of Civil Appeals, raised the question of "just compensation" and adequately apprised the Court as to our contentions respecting the submission of this question, i.e., the exclusion of our evidence relative to moving costs (Question 2) and costs of readapting the remainder (Question 3). Rule 469c T.R.C.P. only required that such points be stated in short form without argument and be germane to some assignment of error in the motion for new trial in the trial court. Petitioner contends that Points of Error I, IV and VI are germane to assignments of error 2, 3, 5, and 13, as presented to the trial court in its Amended Motion for New Trial. Under Rule 418, T.R.C.P., it is not necessary that a "point" be complete within itself, in the sense that it must, on its face, show that the matter complained of presents reversible error.

QUESTIONS 4 AND 5 GROUPED AND STATED:

QUESTION 4: Did the Court of Civil Appeals err in holding that the trial court did not err in refusing

to allow recovery as separate items of damage, the loss of profit sustained by Petitioner's business and moving costs and costs of readapting the remainder incurred by Petitioner as a result of the condemnation of a portion of its property?

QUESTION 5: Did the Court of Civil Appeals err in holding that Points IV, V and VI in Appellant's brief wherein Appellant contended that it should recover its moving costs and costs of readapting the remainder of its property for continued use thereof as a laundry and dry-cleaning plant and also its loss of profits, all caused by a partial taking of its property by Appellee through condemnation, were points which were not specially presented to the trial court by the Motion for New Trial, and this Court is not authorized to consider them?

In attempting to show why the above two questions should be answered in the negative, Respondent has quoted the Court of Civil Appeals, as follows:

> "These points of error are stated to be based on Assignments of Error 2, 3, 5, and 13. The points are too general to comply with the briefing rules. Rule 418 T.R.C.P. Neither of the points complains that the Court erred in admitting evidence offered by Appellant with proper qualifications, nor do they complain that the trial court erred in refusing to submit properly requested issues. The points are germane to the Assignments of Error only in the sense that the matters complained of in the Assignments of Error made it impossible for Appellant to secure jury findings on which to base a judgment for the specific additional damage he contends he was entitled to receive under the Constitutions of the

> United States and the State of Texas. These points were not specifically presented to the trial court by the Motion for New Trial, and this Court is not authorized to consider them." (Authorities cited)

In reply to this argument, Petitioner would point out that by the Court of Civil Appeals' own admission, our points were germane to the Assignments of Error 2, 3, 5, and 13, as contained in our Amended Motion for New Trial. Rule 418(c) T.R.C.P. only requires that a point of error be germane to some assignment of error in the motion for new trial. Also, after a close reading of the above-mentioned assignments of error, (Petition for Writ of Certiorari, P. 12) how can it be said that such do not draw the Court's attention to specific errors committed in the trial court? We objected to the trial court's refusal to admit evidence on the costs of moving and costs of readapting the remainder (Tr. 122). This point was preserved at the time of trial, timely presented in our Amended Motion for New Trial, and raised in our Points of Error I, IV and VI before the Court of Civil Appeals.

In response to Petitioner's offer of evidence on loss of profits and an objection to such offer from Respondents, the trial court admitted our offer of such evidence for a limited purpose. If the record fails to reflect an objection on our part to this limit placed on our offer by the trial court, it is our position that such error was preserved without a formal objection. We did not offer this testimony for a limited purpose. Further, this error was presented to the trial court in our Amended Motion for New Trial (Nos. 2, 3, 5 and 13) and to the Court of Civil Appeals through Point of Error No. V.

LOSS OF PROFITS

Points of Error I and V
(Germane to Assignments of Error 2, 3, 5, 13)

As in the Waco Independent School District Case, discussed on page 25 of our Petition for Writ of Certiorari, we feel as though the present case presents a situation involving special damage for which the "market value rule" does not provide adequate compensation. These special damages should include loss of profits as well as moving costs and costs of readapting the remainder.

Respondents have cited *Reilly v. State*, 382 S.W.2d 116 (Tex. Civ. App. 1964, ref. n.r.c.) regarding loss of profits as a separate item of damages. We fail to see how the Courts of Texas can say that loss of access from one's property to the public highway system is any more "peculiar" or "special" than losing a section of your property through a partial condemnation which causes the continuation of your business on the remainder to be economically unfeasible. Our loss of profits can be limited in time so as to encompass the time in between the date of taking and the time Petitioner's business was relocated on suitable premises. In the face of such a record, these losses are real, determinable, and directly caused by this partial condemnation of Petitioner's land for a public use.

MOVING EXPENSES

Points of Error I and IV
(Germane to Assignment of Error 2, 3, 5, 13)

It is Petitioner's contention that we are entitled to recover moving expenses under the Constitutions of the

United States, the State of Texas, and Article 3265 V.A.C.S. as separate items of damage.

In Respondents' (Plaintiff's) Reply to Defendant's Amended Motion for New Trial, and in their Brief filed in the Court of Civil Appeals, they argue that if such expenses are recoverable at all, then they are only recoverable under the provisions of Article 6674n-4, V.A.C.S. Now Respondents have implied that recovery under 6674n-4, V.A.C.S., is not likely. In their Response to our Petition for Writ of Certiorari, page 16-17, Respondents have discussed the applicability of two statutes (Article 3265, Section 7, V.A.C.S. and Article 6674n-4, V.A.C.S.) which deal with the recovery of moving expenses. It is interesting to note how they first say that Section 7 of Article 3265, V.A.C.S., could not apply due to its date of enactment and then avail themselves of the "other existing law clause" contained therein, to point to the possible application of Article 6674n-4 (subsequently renumbered as Article 3266b). The Court of Civil Appeals in its opinion alluded to the fact that we failed to request issues necessary for a recovery under Section 7 Article 3265, V.A.C.S. But, how do we request special issues on moving costs, costs of readapting the remainder, or for loss of profits when the trial court has either excluded all such evidence from the ears of the jury or instructed them as to its limited purpose? If such "other existing law clause" can be used, why does it not refer to the Constitution of the United States (28 U.S.C.A. Const. Amend.V) or to Article 3265 Section 3, V.A.C.S. wherein it speaks of injuries to the owner (Petition for Writ of Certiorari Page 6)?

COSTS OF READAPTING THE REMAINDER

Points of Error I and VI
(Germane to Assignment of Error 2, 3, 5, 13)

By way of reply to Respondents' argument that Petitioner, with regards to readapting costs, was "wanting his cake and wishing to eat it too," we would hasten to point out that much of the equipment which had been used by your Petitioner at the Almeda location before the condemnation could not be used on the remainder due to lack of space (Tr. p. 86, Ln. 19-23). It is clear that Pilgrim was specially damaged because much of the equipment which had been used before the condemnation was rendered valueless because it could not be installed in the remainder. New equipment had to be purchased by Pilgrim in order to attempt to continue its business on the remainder (Tr. 86, Ln. 2-7).

Even though both of said witnesses did testify as stated (Response to Petition for Writ of Certiorari, p. 21), nevertheless, that conclusion was reached by said witnesses after the Condemnee had moved said machinery and equipment, readapted the remainder, and operated its laundry and dry-cleaning plant thereon and found that such operations resulted in substantial loss of income to Petitioner (landowner).

It is also quite significant to point out that on the other hand, the witness for the condemnor, Atkinson, testified that both of said buildings did have a market value after the taking. So the matter as to whether or not said buildings did or did not have a market value after the taking was squarely before the jury and, therefore, the evidence as to the moving costs and costs of readapting

the remainder should have been allowed by the Trial Court to have been introduced to the jury.

Respectfully submitted,

LEWIS W. CUTRER
JAMES E. HAYS

By_____
LEWIS W. CUTRER
Counsel for Petitioner
3901 Westheimer, Suite 301
Houston, Texas 77027

CERTIFICATE OF SERVICE

The undersigned, the Attorney of Record for Petitioner, does hereby certify that on this _____ day of November, 1972, he did deposit in the United States mail, with sufficient postage to deliver same, two (2) true and correct copies of this Reply Brief, addressed to Mr. Joe Resweber, County Attorney — Attention: Mr. Edward J. Landry, 202 Harris County Courthouse, Houston, Texas 77002, Attorney for Respondents.

_____
LEWIS W. CUTRER